

1989

Ray H. Buchanan v. Robert P. Hansen Marilyn W. Hansen : Response to Petition for Rehearing

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

.S9
DOCKET NO. 890242

IN THE SUPREME COURT OF THE STATE OF UTAH

RAY H. BUCHANAN,

Plaintiff/Appellee,

VS.

ROBERT P. HANSEN and
MARILYN W. HANSEN,

Case No. 890242

Defendants/Appellants.)

RESPONSE TO PETITION FOR REHEARING

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
THE HONORABLE RAY M. HARDING

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of and for
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Provo, Utah 84601

FILED

SEP 30 1991

CLERK SUPREME COURT
UTAH

RAY H. BUCHANAN,
Plaintiff/Appellee,
vs.
ROBERT P. HANSEN and
MARILYN W. HANSEN,
Defendants/Appellants.

JACKSON HOWARD, Esq.
LESLIE W. SLAUGH, Esq.
of and for
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INTRODUCTION

This Response to Petition for Rehearing is filed pursuant to the request of the Utah Supreme Court and the provisions of Rule 35(a), Utah Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

Buchanan's Petition for Rehearing is not limited to matters the Court "has overlooked or misapprehended"¹ but rather raises new contentions and issues not originally presented to the Court. Furthermore, the arguments raised are substantively and factually without merit.

Moreover, the Court's Opinion needs no clarification for the purpose of assisting the parties on remand. Finally, the lower court correctly certified its ruling under Rule 54(b), Utah Rules of Civil Procedure. The facts forming the basis of the lower court's Final Judgment Quieting Title were different than those underlying the other claims in the action.

ARGUMENT

POINT I

THE COURT CORRECTLY HELD THAT BUCHANAN DID NOT STRENGTHEN HIS TITLE TO THE PROPERTY BY PAYMENT OF THE DELINQUENT TAXES

Buchanan first contends that the Court erred in holding that the Picadilly property remained subject to the Hansens'

¹ Rule 35(a), Utah Rules of Appellate Procedure.

\$200,000 lien for the reason that Buchanan was not the sole purchaser of the property at the tax sale. Buchanan argues:

The facts set forth in page 7 of the Hansens' brief, and concurred with Buchanan, established that Buchanan was not the sole purchaser at the tax sale. The tax deed was issued to "Ray and Francis A. Buchanan and John C. Swindle, Trust." (R. 261, copy in Appendix B.) Ray Buchanan had at most a one-third interest in the property following the tax sale. The other two-thirds interest were owned by strangers to the property. The interest of all three of the tax purchasers were subsequently conveyed to "John Swindle, as Trustee of the Ray H. Buchanan and Francis Buchanan Trust." (R. 262, copy in Appendix C.) John Swindle ultimately quit claimed the property to Ray H. Buchanan. (R. 263, copy in Appendix D.)

At least two-thirds of Buchanan's interest in the property, therefore, derives from a tax deed issued to strangers to the title. It follows that the \$200,000 lien in favor of Hansens was extinguished with respect to that two-thirds interest and remains a lien only as to an undivided one-third interest in the property.²

Buchanan presents this argument for the first time in his Petition for Rehearing. Accordingly, it must, on this basis alone, be rejected by the Court. A Petition for Rehearing is limited to "the points of law or fact which the petitioner claims the court has overlooked or misapprehended . . ."³ The Brief of Appellee filed by Buchanan before this Court nowhere raises the argument now asserted; that is, that, at most, there "remains a lien only as to an undivided one-third interest in the property."

² Petition for Rehearing, p. 2.

³ Rule 35(a), Utah Rules of Appellate Procedure.

Likewise, this argument was not advanced by Buchanan in the court below.⁴

It is well settled that a losing party cannot use a Petition for Rehearing to present a new theory or contention which was neither in the record as it was before the Court or in the arguments made. Lockhart Co. v. Anderson, 646 P.2d 678, 681 (Utah 1982); Swanson v. Sims, 51 Utah 485, 498, 170 P. 774, 778 (1918). See also Ainsworth v. Combined Ins. Co. of America, 774 P.2d 1003 (Nev. 1989); Kentner v. Gulf Ins. Co., 298 Or. 69, 689 P.2d 955 (1984); Wernberg v. State, 519 P.2d 801 (Alaska 1974). As stated by the Wyoming Supreme Court in State Board of Equalization v. Jackson Hole Ski Corp., 745 P.2d 58, 60 (Wyo. 1987):

As a general rule, a rehearing cannot be had on matters or questions which were not urged at the original hearing or for the purpose of affording an opportunity to present new questions or issues. Matters which were not brought at the original hearing, therefore, are deemed to have been waived, either expressly or by implication, and may not be considered on a petition for rehearing. [citations omitted].

Moreover, Buchanan's contention is substantively without merit. For ease of description, the parties to this litigation, and their counsel, have referred to the "Ray H. Buchanan and Francis

⁴ See Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, R. 242-54; Plaintiff's Memorandum in Reply to Defendants' Memorandum in Opposition to Motion for Partial Summary Judgment and in Support of Cross Motion for Summary Judgment, R. 385-402.

A. Smith Buchanan Trust" as "Buchanan." For example, Ray Buchanan has stated:

Since no partnership had been organized for the construction of the Holiday Inn, and no financing had been secured, it was agreed that I would be issued an interest bearing demand Note (the "Note") secured by a Deed of Trust (the "Trust Deed") on a portion of the property sold by Buchanan to 1555 Canyon Road Partnership, on which was located a Picadilly Fish & Chips Restaurant (the "Picadilly property"). . . .⁵

However, Ray H. Buchanan further states that it was himself and John C. Swindle "acting as Trustees for the Ray H. Buchanan and Francis A. Smith Buchanan Trust," who sold the property to the 1555 Canyon Road Partnership.⁶ Furthermore, the Promissory Note was issued by the 1555 Canyon Road Partnership to Ray H. Buchanan and John C. Swindle, Trustees for the Ray H. Buchanan and Francis A. Smith Buchanan Trust,⁷ not to Ray H. Buchanan. Moreover, while it is not part of the Record in this case,⁸ the Trust Deed filed on Buchanan's behalf on December 11, 1981, securing the \$100,000 Note shows the beneficiaries to be

⁵ Affidavit of Ray H. Buchanan, ¶ 3 at R. 256.

⁶ Affidavit of Ray H. Buchanan, ¶ 2, R. 255-56.

⁷ Deposition Exhibit 32 to Deposition of Brent R. Dyer, R. 622, attached hereto as Appendix "A."

⁸ The Trust Deed is not a part of the Record for the sole and singular reason that this issue has never before been raised by Buchanan. Had this issue been raised before the lower court, the Record would have been supplemented.

"RAY H. BUCHANAN and JOHN C. SWINDLE, Trustees for the Ray H. Buchanan and Francis A. Smith Buchanan Trust." ⁹

The tax deed was issued to "RAY &. [sic] and FRANCIS A. BUCHANAN and JOHN C. SWINDLE, TRUST." It is, however, admitted by Buchanan that the tax deed was in error. As stated by Buchanan:

The Picadilly property which is the subject of this lawsuit was purchased at the May 1987 tax sale by John Swindle as the trustee for the Ray H. and Francis E. [sic] Buchanan Trust. However, the tax deed was erroneously issued by Utah County to Ray and Francis Buchanan and John Swindle Trust (sic). I attempted to rectify this error, but the County was unwilling to modify the tax deed issued by it. Therefore, Ray and Francis Buchanan and John Swindle quit claimed the property to John Swindle, as the trustee for the Ray H. and Francis E. [sic] Buchanan trust. Recently, the Picadilly property was quit claimed to me by the Ray H. and Francis E. [sic] Buchanan trust for the purpose of clearing the title to the property. It is my intention to quit claim the property back to the trust should the quiet title action be successful.¹⁰

In summary, the Trust which redeemed the property at the May 1987 tax sale was the same Trust that was the beneficiary under the junior Trust Deed filed on the Buchanans' behalf on December 11, 1981. The Trust could not improve its junior lienholder status by purchasing the Picadilly property at the tax sale. Crofts v. Johnson, 6 Utah 2d 350, 313 P.2d 808, 810 (1957); Hadlock v. Benjamin Drainage District, 89 Utah 94, 53 P.2d 1156, 1157 (1936). Buchanan, having acquired the Picadilly property from

⁹ Copy in Appendix "B."

¹⁰ Supplemental Affidavit of Ray H. Buchanan, ¶ 2, R. 412.

the Trust, acquired the property subject to the Hansens' Trust Deed lien. Tuft v. Federal Leasing, 657 P.2d 1300 (Utah 1982).

In short, this Court correctly held that the Picadilly property remains subject to the Hansens' \$200,000 lien. Buchanan's Petition for Rehearing is substantively and factually without merit and should be denied.

POINT II

THE COURT'S DECISION NEEDS NO CLARIFICATION

Buchanan contends that the Court should rehear this appeal for the purpose of clarifying three issues, to wit:

1. That Buchanan has a lien for the full amount of taxes paid;¹¹

2. That Buchanan has a prior lien for the reasonable value of repairs he made, or alternatively, this Court should expressly acknowledge that the matter remains open for determination by the trial court;¹² and

3. The Court should clarify that its holding does not impair Buchanan's remaining claims regarding the validity of the Hansens' lien.¹³

¹¹ Petition for Rehearing, pp. 3-4.

¹² Id., p. 4.

¹³ Id., pp. 5-6.

The Court's Opinion needs no clarification on these issues.

A. No Clarification is Necessary Regarding a Lien for the Payment of Taxes.

The issue presented to this Court, and upon which the Court ruled, was whether, given the undisputed facts of this case, the lower court correctly ruled that title to the Picadilly property should be quieted in Buchanan based upon the purchase of the Picadilly property at the tax sale.¹⁴

In support of his contention that the tax deed conveyed title free of any claim by the Hansens, Buchanan argued, in one sentence, that "[e]ven assuming, arguendo, that trust deed beneficiaries have a duty to pay property taxes, as between the Hansens and Buchanan, the Hansens had just as much an obligation to pay taxes on the Picadilly property as Buchanan."¹⁵ Because the Hansens

¹⁴ The issues raised on appeal were:

1. Did the trial court err, as a matter of law, in ruling that Buchanan did not assume or in any way become liable to insure that the delinquent property taxes were paid; that is, that Buchanan had no duty to pay the property taxes on the subject property?

2. Did the purchase by Buchanan, his wife Francis and John Swindle at the tax sale of the subject property constitute nothing more than the payment of taxes or the redemption of the property by the owners of a legal interest in the property?

3. Can Buchanan strengthen his title by purchase of the subject property at the tax sale?

¹⁵ Brief of Appellee, p. 11.

failed to pay the property taxes, "[p]rinciples of equity demand that title be quieted in Buchanan and that the Hansens' interest be extinguished once and for all."¹⁶

In response, the Hansens contended that where two or more persons have a duty to pay property taxes, and one which has a duty to pay property taxes purchases at a tax sale, the tax sale purchaser takes no greater title to the property than before. He does, however, have a claim against the others having the duty for reimbursement of their respective share of that portion paid at tax sale. See Massey v. Prothero, 664 P.2d 1176, 1178 (Utah 1983).¹⁷ The Hansens further noted that if the Court subsequently determined that the trial court was in error in quieting title in Ray Buchanan, the lower court could require payment by the Hansens to Buchanan of their pro rata share of the taxes paid at the May 1987 tax sale.¹⁸

This Court implicitly rejected Buchanan's contention that equity required that the title be quieted in Buchanan on the basis of the payment of past-due taxes. Any expression by this Court in the Opinion regarding any lien that Buchanan may have for the payment of taxes would be mere obiter and extraneous to the Final Judgment Quieting Title from which the appeal was taken.

¹⁶ Brief of Appellee, p. 12.

¹⁷ Reply Brief of Appellants, p. 5.

¹⁸ Id., p. 6.

B. No Clarification is Necessary on the Issue of Unjust Enrichment.

For the first time, Buchanan raises the issue of "unjust enrichment" on his Petition for Rehearing. This is not a "point of law or fact which . . . the court has overlooked or misapprehended" as required by Rule 35(a), Utah Rules of Appellate Procedure. See also Lockhart Company v. Anderson, 646 P.2d 678 (Utah 1982); State Board of Equalization v. Jackson Hole Ski Corp., 745 P.2d 58 (Wyo. 1987). Accordingly, on this ground alone, the Court should deny the Petition insofar as it relates to the issue of unjust enrichment.

Moreover, given the record before this Court, the Court cannot conclude that if the Hansens foreclose on their Trust Deed that they would be unjustly enriched. Accordingly, any "clarification" on this issue would be improper. Cf. Associated Industrial Developments, Inc. v. Jewkes, 701 P.2d 486, 487-88 (Utah 1984).

C. No Clarification is Necessary Regarding the Hansens' Lien.

Buchanan contends that because additional claims are still present before the lower court relating to an alleged "extinguishment" of the Hansens' Trust Deed lien, the Court's Opinion should be modified to clarify that the Court's decision does not impact the remaining issues before the lower court.

Such a clarification is not necessary. The Court's Opinion relates only to the holding of the lower court that the Hansens' Trust Deed was extinguished by the tax sale purchase of the Picadilly property. The Court's Opinion clearly indicates that the decision is predicated solely upon the issues related to the tax sale. The Court states:

We conclude that Buchanan did not strengthen his title to the Picadilly property by payment of the delinquent taxes at the May 1987 tax sale. He simply redeemed the property, and therefore, the property remains subject to the Hansens' \$200,000 lien.¹⁹

If the lower court subsequently finds that the Tax Deed lien has been extinguished by reason of some other fact or occurrence not related to the facts and issues on this appeal, the Court's Opinion is not res judicata nor does it constitute the law of the case.

POINT III

THE LOWER COURT CORRECTLY CERTIFIED ITS ORDER AS A FINAL JUDGMENT

Relying upon this Court's decision in Kennecott Corporation v. Utah State Tax Commission, 163 Utah Adv. Rptr. 3 (June 14, 1991), Buchanan now argues that the Court lacked jurisdiction to consider this appeal on the grounds that the lower court incorrectly

¹⁹ Slip Op. at p. 6.

entered a Rule 54(b) certification.²⁰ Once again, this contention is without merit.

In Kennecott Corporation the Court adopted the approach of the Seventh Circuit that "several legal theories based on one set of facts do not convert the theories into separate claims for purposes of rule 54(b)." Id. at 5 (emphasis added.) Utilizing this analysis, it is clear that the factual basis upon which the lower court granted Buchanan Summary Judgment is distinct from the other facts upon which Buchanan's remaining legal theories are predicated.

Buchanan's Second Amended Complaint²¹ sets forth five causes of action. The First Cause of Action seeks a declaration of the Court quieting title in Buchanan. The Second Cause of Action seeks an injunction enjoining the Hansens from foreclosing or selling the property under their Trust Deed. The Third Cause of Action asserts a claim for damages for the alleged wrongful failure of the Hansens to reconvey the Trust Deed dated December 11, 1981. The Fourth Cause of Action asserts a claim for breach of contract. The Fifth Cause of Action seeks damages for an alleged breach of an assumption of liability agreement.

A review of the Second Amended Complaint reveals that none of the remaining claims before the lower court are predicated

²⁰ Rule 54(b), Utah Rule of Appellate Procedure.

²¹ Attached hereto as Appendix "C."

upon the facts relating to the purchase by the Buchanans of the Picadilly property at the tax sale. Indeed, the First Cause of Action asks the Court to quiet title in Buchanan based upon the acquisition of the Hansens of a limited partnership interest in an entity known as the Pacific Western Limited Partnership.²² Indeed, the Court granted Buchanan Partial Summary Judgment, and quieted title in Buchanan, based upon a theory and an alleged set of facts (the purchase at the tax sale) not set forth in Buchanan's Second Amended Complaint.²³ This issue was not, however, raised by the Hansens' former counsel below the lower court and, accordingly, was not raised on this appeal. The facts upon which the lower court based its conclusion that the Buchanans' purchase of the Picadilly property at the tax sale extinguished the Hansens' Trust Deed lien is "different than those underlying other claims in the action." Accordingly, the Rule 54(b) certification entered by the lower court was proper.

Buchanan also argues that "liability issues may not be separated from the damages issues for purposes of appeal."²⁴ As

²² See Second Amended Complaint, First Cause of Action, R. 63-65.

²³ On this ground alone, the lower court erred in granting Buchanan's Motion for Partial Summary Judgment and in quieting title in Buchanan.

²⁴ Petition for Rehearing, p. 5.

a general proposition, this statement is correct. It is not, however, applicable to the instant case.

The Second Amended Complaint sets forth causes of action for damages entirely unrelated to the lower court's decree quieting title in Buchanan based upon the tax deed. The Third Cause of Action is premised upon the refusal of the Hansens to reconvey the Trust Deed in violation of Utah Code Ann. § 57-1-33. Under the Third Cause of Action, the Hansens' Trust Deed on the Picadilly property is allegedly null and void for the reason that "the obligation secured by said Trust Deed has been satisfied."²⁵ The other claims for damages arise out of an alleged breach of contract and breach of an assumption of liability agreement which were, once again, unrelated to the purchase by the Buchanans of the Picadilly property at the tax sale.

In short, the lower court correctly entered a rule 54(b) certification of the Final Judgment Quieting Title in Ray Buchanan.

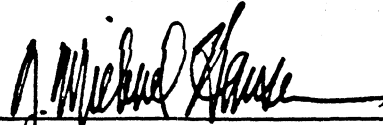
CONCLUSION

Buchanan has presented no ground sufficient for the Court to grant a rehearing in this matter. The Court must deny the Petition for Rehearing.

²⁵ Second Amended Complaint, ¶ 27, R. 66.

DATED this 30th day of September, 1991.

SUITTER AXLAND ARMSTRONG & HANSON

A handwritten signature in dark ink, appearing to read "J. Michael Hansen", written over a horizontal line.

J. MICHAEL HANSEN, Esq.
Attorney for Defendants/Appellants

(Original Signature)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the foregoing Response to Petition for Rehearing were mailed, postage prepaid thereon, this 32nd day of September, 1991, to the following:

Jackson Howard, Esq.
Leslie W. Slaugh, Esq.
HOWARD, LEWIS & PETERSEN
Attorneys for Plaintiff/Appellee
120 East 300 North
Provo, Utah 84601

A handwritten signature in black ink, appearing to read "J. Michael Thorne", is written over a horizontal line.

(Original Signature)

JMB32.8

A P P E N D I X

TRUST DEED NOTE

EXHIBIT
32
12-4-86

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

100,000.00

Provo, Utah

December 11, 1981

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of
RAY H. BUCHANAN and JOHN C. SWINDLE, Trustees for the Ray H. Buchanan and
Francis A. Smith Buchanan Trust

ONE HUNDRED THOUSAND AND NO/100----- DOLLARS (\$100,000.00),

together with interest from date at the rate of NINE per cent (9%) per annum on
the unpaid principal, said principal and interest payable as follows:

Upon Demand

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any
such installment not paid when due shall bear interest thereafter at the rate of EIGHTEEN
per cent (18%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in
the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its
option and without notice or demand, may declare the entire principal balance and accrued interest due and
payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with
or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including
a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand
and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals,
waivers or modifications that may be granted by the holder hereof with respect to the payment or other pro-
visions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.

1555 CANYON ROAD PARTNERSHIP

By: 

WHEN RECORDED, MAIL TO
WESTERN STATES TITLE COMPANY
370 East 500 South
Salt Lake City, Utah 84111

35003

Trust Deed

Space Above This Line for Recorder's Use

DEC 11 1981

35003

THIS TRUST DEED is made this 11th day of December, 1981.

between 1555 CANYON ROAD PARTNERSHIP, a Utah General Partnership, as Trustor,
c/o Akerlow, Thomas, Dyer
whose address is 68 South Main Street, Salt Lake City, Utah (State)

WESTERN STATES TITLE COMPANY, as Trustee,* and

RAY H. BUCHANAN and JOHN C. SWINDLE, Trustees for the Ray H. Buchanan and Francis A. Smith Buchanan Trust, as Beneficiary.

Trustor hereby CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER

OF SALE, the following described property situated in Utah County, Utah:

"See Exhibit "A" - attached hereto and
by this reference made a part hereof."

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereto now or hereafter used or enjoyed with said property, or any part thereof.

FOR THE PURPOSE OF SECURING payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ 100,000.00, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and payment of any sums expended or advanced by Beneficiary to protect the security hereof.

Trustor agrees to pay all taxes and assessments on the above property, to pay all charges and assessments on water or water stock used on or with said property, not to commit waste, to maintain adequate fire insurance on improvements on said property, to pay all costs and expenses of collection (including Trustee's and attorney's fees in event of default in payment of the indebtedness secured hereby and to pay reasonable Trustee's fees for any of the services performed by Trustee hereunder, including a reconveyance hereof.

The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

1555 CANYON ROAD PARTNERSHIP

By: *[Signature]*

STATE OF UTAH

COUNTY OF *[Signature]*

On the 11th day of December, 1981, personally appeared before me

Ray H. Buchanan, a partner of 1555 Canyon Road Partnership, the signer of the foregoing instrument, who duly acknowledged to me that he executed the same for and on behalf of 1555 Canyon Road Partnership, a Utah general partnership.

[Signature]
Notary Public

My Commission Expires: 9-16-83

Residing at: Salt Lake City

*NOTE: Trustee must be a member of the Utah State Bar, a bank, building and loan association, savings and loan association authorized to do such business in Utah, a corporation authorized to do such business in Utah, or a title insurance or abstract company authorized to do such business in Utah.

Form No. 121 - Trust Deed Short Form

457-20348
457-6512

NOV 1983 REC 476

EXHIBIT "B"

EXHIBIT "A"

PARCEL B:

Beginning at a point on the Westbound street of 150 East Street, Provo, which point is located East 139.96 feet and North 296.86 feet from the East quarter corner of Section 36, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North 1°45' East 106.00 feet; thence West 126.90 feet; thence South 1°45' West 106.00 feet to the North line of Osmond Brothers, a Utah Partnership; thence along said North line East 126.90 feet to the point of beginning.

STATE OF UTAH
COUNTY OF UTAH

I, THE UNDERSIGNED RECORDER OF UTAH COUNTY, UTAH
DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A
TRUE COPY OF THE ORIGINAL RECORDED DOCUMENT IN THE
OFFICIAL RECORD IN MY OFFICE AS THE SAME APPEARS IN

BOOK 1953 PAGE 478

WITNESS MY HAND AND SEAL OF SAID OFFICE THIS 26th

DAY OF September 19 91

NINA B. REID, RECORDER

Jo Anne Rigney DEPUTY

35003

BOOK 1953 PAGE 478

Robert M. Anderson, # 0108
William P. Schwartz, # 4404
HANSEN & ANDERSON
50 West Broadway, 6th Floor
Salt Lake City, Utah 84101
Telephone: (801) 532-7520
Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

—oo0oo—

RAY H. BUCHANAN,

:

Plaintiff,

:

vs.

:

SECOND AMENDED COMPLAINT

ROBERT P. HANSEN and
MARILYN W. HANSEN,

:

Civil No. CV-86-2094

:

Defendants.

—oo0oo—

Plaintiff Ray H. Buchanan hereby complains against defendants Robert
P. Hansen and Marilyn W. Hansen and avers as follows:

PARTIES

1. Plaintiff is a citizen of the State of Utah currently residing in
Great Britain.

2. Defendants are citizens of the State of Utah currently residing in
Salt Lake City.

JURISDICTION AND VENUE

3. This Court possess jurisdiction over this matter pursuant to
U.C.A. §78-3-4.

4. Venue is proper in this Court pursuant to U.C.A. §78-13-1(1) in
that this action relates to real property located in Utah County.

EXHIBIT "C"

FACTS

5. On November 17, 1980, Ray H. Buchanan and John C. Swindle, Trustee for the Ray H. Buchanan and Frances A. Smith Buchanan Trust, sold to the 1555 Canyon Road Partnership a piece of property located on Canyon Road in the city of Provo, Utah. 1555 Canyon Road Partnership was a general partnership formed for the purpose of developing property located on Canyon Road in the city of Provo, Utah and Charles W. Akerlow, John Joel Thomas and Brent R. Dyer were the partners. On December 11, 1981, the parties agreed to terminate the contract for purchase dated November 17, 1980 and to substitute therefor a new agreement. Under the terms of the new agreement, Ray Buchanan and the Ray H. Buchanan and Frances A. Smith Buchanan Trust were to be paid \$322,494.34. Of this amount, \$222,494.34 was to be paid in cash and the balance of \$100,000 was to be regarded as an investment in a limited partnership which was to construct a Holiday Inn on the property.

6. Since no partnership had been organized for the construction of the Holiday Inn, and no financing had been secured, it was agreed that Ray H. Buchanan would be issued an interest bearing demand Note (the "Note") secured by a Deed of Trust (the "Trust Deed") on a portion of the property sold by Buchanan to 1555 Canyon Road Partnership, on which was located a Picadilly Fish & Chips Restaurant (the "Picadilly property"). The legal description for the Picadilly property is as follows:

Beginning at a point on the Westbound Street of 150 East Street, Provo, which point is located East 139.96 feet and North 296.86 feet from the East quarter of corner of Section 36, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North 1°45' East 160.00 feet; thence West 126.90 feet; thence South 1°45' West 106.00 feet to the North line of Osmond Brothers, a Utah

partnership; thence along said North line East 126.90 feet to the point of beginning.

7. No part of the Note or interest was ever paid, causing plaintiff to file a Complaint foreclosing the Trust Deed against Akerlow Thomas Dyer, Inc., 1555 Canyon Road Partnership, Charles W. Akerlow, John Joel Thomas and Brent R. Dyer.

8. Plaintiff thereafter obtained a stipulated judgment against Charles W. Akerlow, Akerlow Thomas Dyer, Inc. and 1555 Canyon Road Partnership in the sum of \$100,000, plus prejudgment interest in the amount of \$22,316.03, costs of suit in the amount of \$45.50, \$500 as a reasonable attorneys' fee, and post-judgment interest at the rate of \$49.32 per day.

9. In attempting to collect said judgment from 1555 Canyon Road Partnership, plaintiff executed against the Picadilly property, which property was sold to plaintiff pursuant to a duly noticed execution sale by the Sheriff of Utah County on or about September 30, 1985.

10. On or about April 26, 1986, the statutory period for redemption having expired, the Sheriff of Utah County lawfully issued to plaintiff a sheriff's deed to the Picadilly property vesting full legal title to the property in plaintiff. (A copy of the Sheriff's Deed is attached hereto as Exhibit "A").

FIRST CAUSE OF ACTION

(Declaratory Relief Quieting Title)

11. Plaintiff reasserts and incorporates by this reference the averments set forth at paragraphs 1 through 10 of this Amended Complaint.

12. On or about December 11, 1981, defendants caused to be recorded with the Utah County Recorder a trust deed relating to the Picadilly property. Although plaintiff's Trust Deed relating to the Picadilly property was

also recorded on December 11, 1981, defendants' Trust Deed was recorded one minute before plaintiff's trust deed.

13. Upon information and belief, defendants' trust deed was granted to them by 1555 Canyon Road Partnership as security for a \$200,000 promissory note executed in defendants' favor by 1555 Canyon Road Partnership and Charles W. Akerlow.

14. In July of 1982, defendants agreed to convert the debt owing from 1555 Canyon Road Partnership and Charles W. Akerlow to a limited partnership interest in Pacific Western Limited Partnership, a partnership controlled by Charles W. Akerlow.

15. The only consideration given by defendants for said limited partnership interest consisted of the conversion of said debt, and defendants' only capital contribution to Pacific Western Limited Partnership consisted of the conversion of said debt.

16. Pursuant to defendants' limited partnership interest in Pacific Western Limited Partnership, defendants became entitled to and deducted partnership losses from their personal income tax returns for at least the years 1982 and 1983, in a total amount in excess of \$245,000.

17. The debt owing by 1555 Canyon Road Partnership and Charles W. Akerlow having been converted by defendants' to a partnership interest, and defendants having derived substantial tax benefits from said interest, the debt owing to defendants has been satisfied and the Trust Deed securing said debt is without legal effect and is no longer a valid lien against the Picadilly property.

Defendants refusal to release and reconvey said Trust Deed has caused a cloud on plaintiff's title to the Picadilly property.

18. Plaintiff is entitled to an Order from this Court declaring defendants' Trust Deed null, void and without legal effect and quieting title to the Picadilly property in plaintiff and against defendants.

SECOND CAUSE OF ACTION

(Injunction)

19. Plaintiff reasserts and incorporates by this reference the averments set forth at paragraphs 1 through 18 of this Amended Complaint.

20. On or about April 28, 1986 defendants recorded with the Utah County Recorder a Notice of Default relating to the Picadilly property.

21. Defendants have expressly threatened to proceed to foreclose upon their Trust Deed relating to the Picadilly property.

22. If defendants are permitted to proceed with their threatened foreclosure sale of the Picadilly property, plaintiff will suffer irreparable harm in that plaintiff is the sole legal title holder to said property and defendants' trust deed in said property is null and void.

23. If defendants are permitted to proceed with their threatened foreclosure sale, said action would violate plaintiff's rights relating to his ownership of said property.

24. Plaintiff is entitled to an order from this Court permanently enjoining defendants from proceeding further to foreclose upon or sell the Picadilly property, and requiring defendants to release their notice of default and Trust Deed relating to the Picadilly property, and requiring defendants to instruct the trustee relating to said Trust Deed to reconvey the Trust Deed to the persons entitled thereto.

THIRD CAUSE OF ACTION

(Refusal to Reconvey Interest)

25. Plaintiff reasserts and incorporates by this reference the averments set forth at paragraphs 1 through 24 of this Amended Complaint.

26. On or about June 11, 1986, plaintiff caused to be delivered to defendants a written demand that defendants instruct the trustee of the Trust Deed relating to the Picadilly property to reconvey the Trust Deed to the persons entitled thereto and to release any claim or interest in the property which appeared of record. (A copy of said written demand is attached hereto as Exhibit "B").

27. Defendants' Trust Deed in the Picadilly property is null and void, in that the obligation secured by said Trust Deed has been satisfied.

28. Defendants have refused for a period of thirty days after written demand therefor to instruct the trustee to reconvey said Trust Deed to the persons entitled thereto in violation of U.C.A. §57-1-33. Defendants' refusal to instruct the trustee to reconvey the subject Trust Deed has caused plaintiff damages in that a cloud remains on plaintiff's title which has rendered the property valueless to plaintiff.

29. Pursuant to U.C.A. §57-1-33, plaintiff is entitled to recover double damages from defendants because of their unlawful refusal to instruct the trustee to reconvey the Trust Deed in the Picadilly property, in the approximate amount of \$500,000.

30. Alternatively, pursuant to U.C.A. §57-1-33, plaintiff is entitled to an order from this Court requiring the defendants to instruct the trustee to reconvey the Trust Deed to the persons entitled thereto, and that the defendants

pay to plaintiff the costs of suit, including a reasonable attorneys' fee and all damages resulting from defendants' unlawful refusal to instruct the trustee to reconvey the subject Trust Deed.

FOURTH CAUSE OF ACTION

(Breach of Contract)

31. Plaintiff reasserts and incorporates by this reference the averments set forth at paragraphs 1 through 30 of this Amended Complaint.

32. On or about December 10, 1981, defendant Robert P. Hansen entered into a contract with Charles Akerlow and Akerlow, Dyer, Thomas, Inc., the relevant terms of which were as follows:

a. Hansen invested \$200,000 in Akerlow's hotel development project in Provo, Utah;

b. Hansen was given the option of being repaid his investment after a specified period, or leaving his investment in the project in return for a future partnership interest;

c. As initial security for Hansen's \$200,000 investment, he received a trust deed in the Picadilly Property, which trust deed was to be released and reconveyed upon his receiving the partnership interest.

33. In July of 1982, Hansen agreed to accept a partnership interest in the Pacific Western Limited Partnership in return for his \$200,000 investment.

34. As a holder of a trust deed in a junior position to Hansen's trust deed, plaintiff was an intended third party beneficiary of the aforementioned contract in that Hansen's release and reconveyance of the Picadilly Property would directly benefit plaintiff, and in that Akerlow and Hansen intended that such a release and reconveyance would benefit plaintiff.

35. Hansen has been repaid his investment in the hotel development project, and has received a partnership interest, but has refused to release or reconvey the Picadilly trust deed.

36. Hansen's refusal to release or reconvey the Picadilly trust deed constitutes a material breach of the contract between Hansen, Akerlow and Akerlow, Thomas, Dyer, Inc.

37. Because plaintiff is now the legal title holder of the Picadilly property, neither Akerlow nor Akerlow, Thomas, Dyer, Inc. has any incentive to enforce Hansen's contractual obligations.

38. Hansen's refusal to release or reconvey the Picadilly trust deed has caused plaintiff, as the third party beneficiary of that contract, damages in at least the amount of \$150,000.

39. Pursuant to U.C.A. §78-27-56, plaintiff is entitled to recover his attorneys' fees incurred herein.

FIFTH CAUSE OF ACTION

(Breach of Assumption of Liability Agreement)

40. On or about July 16, 1983, defendant Robert Hansen entered into a Limited Partnership Agreement with Pacific Western Industries, by and through its chairman, Charles W. Akerlow. The name of the partnership formed pursuant to the Limited Partnership Agreement was Pacific Western Limited Partnership ("Pacific Western").

41. At all relevant periods, Pacific Western Industries was the sole general partner of Pacific Western and Hansen was the sole limited partner.

42. Upon information and belief, Hansen deducted in excess of \$245,000 from his personal tax returns for losses incurred by Pacific Western in the years 1982, 1983 and 1984.

43. Upon information and belief, Hansen's capital account with Pacific Western reflected a negative balance in the years 1982, 1983 and 1984 by virtue of his deduction of losses incurred by Pacific Western on his personal tax returns.

44. According to an Assumption of Liability Agreement dated July 16, 1982, executed by Hansen, Hansen agreed to repay Pacific Western for any negative capital account balance related to Hansen's interest in Pacific Western upon liquidation of Pacific Western. (A true and correct copy of the Assumption of Liability Agreement is attached hereto as Exhibit "C").

45. Pacific Western was liquidated in 1984.

46. Upon information and belief, Robert Hansen possessed a negative capital account in excess of \$245,000 upon the liquidation of Pacific Western.

47. Hansen has not repaid Akerlow, Pacific Western Industries or Pacific Western for Hansen's negative capital account at the time of liquidation and is therefore in breach of the Assumption of Liability Agreement.

48. Charles W. Akerlow, Pacific Western Industries and and Pacific Western have assigned to plaintiff all rights possessed by them by virtue of Hansen's execution of the Assumption of Liability Agreement and Hansen's negative capital account at the time of liquidation, including the right to bring an action against Hansen for his breach of the Assumption of Liability Agreement.

49. By virtue of the aforementioned assignment, plaintiff is entitled to recover as damages from Hansen the full amount of Hansen's negative capital

account at the time of Pacific Western's liquidation, an amount believed to be in excess of \$245,000, plus prejudgment interest at the statutory rate.

WHEREFORE, plaintiff prays for relief against defendants as follows:

Under Plaintiff's First Cause of Action:

1. For an order from this Court declaring defendants' Trust Deed and interest in the Picadilly property null, void and without legal effect and quieting title to said property in plaintiff and against defendants.
2. For costs of suit and, pursuant to §78-27-56, plaintiff's reasonable attorneys' fees incurred herein.
3. For such further relief as the Court deems just and equitable.

Under Plaintiff's Second Cause of Action:

1. For an order from this Court permanently enjoining defendants' from foreclosing upon the Picadilly property or otherwise interfering with plaintiff's use and enjoyment of said property, and requiring defendants to instruct the trustee relating to said Trust Deed to reconvey the Trust Deed to the persons entitled thereto.
2. For costs of suit and, pursuant to §78-27-56, plaintiff's reasonable attorneys' fees incurred herein.
3. For such further relief as the Court deems just and equitable.

Under Plaintiff's Third Cause of Action

1. For double the damages suffered by plaintiff as a result of defendants' refusal to instruct the trustee to reconvey the subject Trust Deed in the approximate amount of \$500,000.
2. Alternatively, for an order from this Court commanding defendants to instruct the trustee to reconvey the subject Trust Deed to the

persons entitled thereto, plus costs of suit, a reasonable attorneys' fee and such other damages suffered by plaintiff as a result of defendants' refusal to so instruct the trustee.

3. For costs of suit and, pursuant to §78-27-56, plaintiff's reasonable attorneys' fees incurred herein.

4. For such further relief as the Court deems just and equitable.

Under Plaintiff's Fourth Cause of Action

1. For damages in at least the amount of \$150,000, the precise amount of which will be proven at trial.

2. For costs of suit and pursuant to §78-27-56 plaintiff's reasonable attorneys' fees incurred herein.

3. For such further relief as the Court deems just and equitable.

Under Plaintiff's Fifth Cause of Action:

1. For damages in the amount of Robert Hansen's negative capital account in Pacific Western upon the date of its liquidation, plus prejudgment interest at the statutory rate.

2. For such further relief as the Court deems just and equitable.

DATED: September ___, 1986.

HANSEN & ANDERSON

William P. Schwartz
50 West Broadway, 6th Floor
Salt Lake City, Utah 84101

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of December, 1986 I caused a true and correct copy of the foregoing Second Amended Complaint to be mailed, postage prepaid, to:

LeRoy S. Axland
J. Michael Hansen
Switter, Axland, Armstrong & Hanson
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480
